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NO. 75-264

IN THE

Supreme Court of the United States

October Term, 1975

PAUL BIK HOGERVORST, JR.
Petitioner,

vs.

STATE OF NEW MEXICO,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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ARGUMENT

The record in this case does not present the constitutional questions mentioned in the footnotes to the Court's opinions in *United States v. Tateo,* 377 U.S. 463, 12 L.Ed. 2d 448, 84 S.Ct., 1587 (1964) and *United States v. Jorn,* 400 U.S. 470, 27 L.Ed. 2d 543, 91 S.Ct. 547 (1971). Those footnotes suggest that reprosecution might be barred where the prosecutorial or judicial impropriety was motivated by a fear that the defendant might be acquitted. *Tateo,* note 3, U.S. at 468; *Jorn,* note 12,

U.S. at 485. The record here contains no intimation that the prosecutorial impropriety resulted from a fear of acquittal.

The Court of Appeals reversed petitioner's conviction because the prosecution failed to correct purportedly false testimony given by its witnesses. The Court did not conclude that the prosecution had intentionally solicited this testimony. It said,

> "It may be questioned whether the prosecutor knowingly or deliberately solicited the evidence because some of the testimony may fairly be read as non-responsive to the questions asked." (Petition, Appendix A, p. A.2.)

The record supports this characterization. The testimony which the Court of Appeals found false was given by the witnesses Autrey, Moore and Williams. The prosecution solicited testimony about bribery of Las Cruces city officials only once. It asked the witness Autrey why he continued to investigate the petitioner after indictments had been returned against him (R. 155). It asked the question in order to rebut the defense of entrapment, which had been raised at the beginning of the proceedings (R. 17, 29, 44, 128R, 128S). All other references to bribery of city officials were volunteered by the witnesses (R. 176, 181, 219-223, 225).

Petitioner was aware throughout the trial that the reputed bribery of Las Cruces city officials was actually a tax payment. He solicited this information from the witness Autrey at the pretrial hearing (R. 105U, 105V). He called it to the Court's attention again during the trial (R. 194). Yet he did not use this information to cross-examine any of the witnesses who gave the purportedly false testimony (R. 176-177, 195-200, 232-243).

The prosecution evidently felt it had no duty to correct the purportedly false testimony or to limit its potential for prejudice since the petitioner was in a position to do so. The prosecution's impropriety was the result of a good faith misunderstanding of its duty. The most extreme characterization that impropriety will bear is that it was the result of negligence

or slightly excessive zeal. Whatever its characterization, the prosecution's conduct is not comparable to the impropriety of the trial judge in the *Tateo* case where this Court held that reprosecution was not barred. *United States v. Tateo, supra.*

The record also shows that there was no possibility that the prosecution's impropriety could have been motivated by fear of acquittal. The prosecution's case was overwhelmingly strong. It had three eyewitnesses to testify that petitioner initiated, planned, and executed the bribery (R. 161-167, 181-189, 217-226). Its chief witness was the local district attorney (R. 217-226). To conclude that the prosecution, armed with such a case, feared acquittal, one must conclude it suffered a paranoia of near psychotic dimensions. There is nothing in the record to support that conclusion, either.

CONCLUSION

The record contains no evidence of prosecutorial impropriety designed to avert a jury verdict of acquittal. The petition for writ of certiorari should be denied.

Respectfully submitted,

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